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Nos. 02-1238; 02-1386; 02-1405

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IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, ATTORNEY GENERAL
OF THE STATE OF MISSOURI,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a State statute that prohibits municipalities and municipally-owned utilities from providing telecommunications services to the public is preempted by 47 U.S.C 253(a), which provides that "[n]o State * * * statute or regulation * * * may prohibit * * * any entity [from] provid[ing] any * * * telecommunications service."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT:	
SECTION 253(a) PREEMPTS MISSOURI'S BAN ON MUNICIPAL ENTRY INTO TELECOMMUNICATIONS MARKETS	8
I. Section 253(a), Interpreted According To Its Plain Meaning, Preempts The Missouri Statute	8
II. Enforcing Section 253(a) According To Its Plain Meaning Does Not Produce Implausible Results And Does Not Raise Constitutional Questions	21
A. Section 253(a), interpreted according to its plain meaning, does not produce implausible results	22
B. Section 253(a), interpreted according to its plain meaning, is not an extraordinary incursion on State sovereignty	24
C. Interpreting Section 253(a) to preempt the Missouri statute raises no substantial constitutional questions	33
D. Interpreting Section 253(a) not to apply to municipalities would create anomalies	34

TABLE OF CONTENTS—Continued

Page

III. The Principle Of *Gregory v. Ashcroft* Does Not Require The Court To Disregard The Plain Meaning Of Section 253(a) 36

CONCLUSION 44

TABLE OF AUTHORITIES

CASES — Page

Alden v. Maine, 527 U.S. 706 (1999) 11, 31
Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995) 14
AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) 2, 14
Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) 17
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 11
Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001) 11
Brogan v. United States, 522 U.S. 398 (1998) 12
Brotherhood. of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519 (1947) 12
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 17-18
City of Abilene v. FCC, 164 F. 3d 49 (D.C. Cir. 1999) 3, 15, 23
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, (1991) 28
City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424 (2002) 25-30, 38-40
City of Trenton v. New Jersey, 262 U.S. 182, (1923) 32
Community Communications Co v. Boulder, 455 U.S. 40 (1982) 10, 32
Cook County v. *United States ex rel. Chandler*, 123 S. Ct. 1239 (2003) 10, 11
Coyle v. Oklahoma, 221 U.S. 559 (1911) 33
Dellmuth v. Muth, 491 U.S. 223, 233 (1989) 40
Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) 12
FDIC v. Meyer, 510 U.S. 471 (1994) 14

TABLE OF AUTHORITIES—Continued

Page

Freytag v. Commissioner, 501 U.S. 868 (1991).... 12
Gregory v. Ashcroft, 501 U.S. 452 (1991)..... *passim*
Hallie v. City of Eau Claire, 471 U.S. 34 (1985).. 32
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)..... 12
Hunter v. City of Pittsburgh, 207 U.S. 161 (1907)..... 32
Jinks v. Richland County, 123 S. Ct. 1667 (2003).....12-13, 31
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)..... 40
Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256 (1985)...25, 29-30, 38, 40
Lincoln County v. Luning, 133 U.S. 529 (1890).... 10
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)..... 10, 11
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)..... 14
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) 10, 11, 31
National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) 12, 20
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)..... 23
New York v. United States, 505 U.S. 144 (1992)... 33
Parker v. Brown, 317 U.S. 341 (1943)..... 10, 32
Pennhurst State School v. Halderman, 451 U.S. 1 (1981)..... 30
Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998).....40, 41-44
Preiser v. Rodriguez, 411 U.S. 475 (1973) 42
Printz v. United States, 521 U.S. 898 (1997) 33

TABLE OF AUTHORITIES—Continued

Page

Public Utility Commission, In re, 13 F.C.C.R. 3460 (1997)....3-4, 15
Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002).... 12-13
Sailors v. Board of Education, 387 U.S. 105 (1967)....10, 32-33
Salinas v. United States, 522 U.S. 52 (1997)....5, 12, 36-41
Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) 32
United States v. Bass, 404 U.S. 336 (1971).... 41
United States v. Gonzales, 520 U.S. 1 (1997) 11
United States v. James, 478 U.S. 597 (1986) 12
United States v. Kagama, 118 U.S. 375 (1886)..... 10
United States v. Turkette, 452 U.S. 576 (1981)..... 12
Verizon, Inc. v. Public Service Commission, 535 U.S. 635 (2002) 1
Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000)..... 10
Will v. Michigan Department of State Police, 491 U.S. 58 (2002) 10
Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991).... 26-29, 38-40

STATUTES

Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq* 42-43
Americans with Disabilities Act of 1990, Title II, 42 U.S.C. 12131 *et seq.* 41-42
42 U.S.C. 12131(1)(B) 41-42
42 U.S.C. 12132 41-42
False Claims Act, 31 U.S.C. 3729 *et seq*.... 10

TABLE OF AUTHORITIES—Continued

	Page
Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*	26-27
7 U.S.C. 136v	26
Payment in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*	29-30
31 U.S.C. 6902(a)	29-30
Pole Attachments Act, 47 U.S.C. 224	20
Sherman Antitrust Act, 15 U.S.C. 1.	10, 32
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56	*passim*
47 U.S.C. 253	*passim*
47 U.S.C. 541(a)(1)	13
18 U.S.C. 666	40-41
28 U.S.C. 1367(d)	12-13
49 U.S.C. 14501(c)(1)	27
49 U.S.C. 14501(c)(2)(A)	27
Mo. Rev. Stat. § 392.410(7)	*passim*
Mo. Rev. Stat. § 392.410(2)	2
MISCELLANEOUS	
H. R. Rep. 104-230, 104th Cong., 2d Sess. 127 (1996)	19, 21
S. Rep. 103-367, 103d Cong., 2d Sess. 22 (1994).	19-21
S. 1822, 103d Cong., 2d Sess. (1994)	19, 20-21
The Communications Act of 1994: Hearings on S. 1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. (1994)	21
American Public Power Ass'n, 2003 Annual Directory & Statistical Report 13	19
Black's Law Dictionary 553 (7th ed. 1999)	5, 8
New Shorter Oxford English Dictionary 830 (1993)	8
Webster's II New College Dictionary 376 (1999)	9

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BRIEF FOR THE RESPONDENTS

STATEMENT

1. The Telecommunications Act of 1996 ("the Act"), Pub. L. No. 104-104, 110 Stat. 56, "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon, Inc. v. Public Service Commission*, 535 U.S. 635, 638 (2002). The purpose of the Act, Congress stated, was "[t]o promote competition and reduce regulation

in order to secure lower prices and higher quality services for American telecommunications consumers" (Pub. L. No. 104-104, 110 Stat. 56, 56 (1996)). In particular, the Act "fundamentally restructure[d] local telephone markets" by providing that "States may no longer enforce laws that impede competition" (*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999)). Section 253(a) of the Act, 47 U.S.C. 253(a), implements this purpose of the Act by providing as follows:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

This limit on state authority is coupled with Section 253(b), which provides that Section 253(a) does not apply as long as the State law in question is "competitively neutral" and necessary to protect legitimate state interests. Section 253(b) of the Act states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

2. In August 1997, the State of Missouri amended Mo. Rev. Stat. § 392.410(7) to forbid municipalities and municipally-owned utilities from entering the telecommunications market. Section 392.410(7) (the "Missouri statute") provides that "[n]o political subdivision of this state shall provide or offer for sale * * * a telecommunications service * * * for which a certificate of service authority is required * * *." Under Missouri law, a certificate of service authority is required to provide intrastate interexchange and local exchange telecommunications services to the public. See Mo. Rev. Stat. § 392.410(2).

Section 253(d) of the Telecommunications Act provides that the Federal Communications Commission is required to preempt any State law that violates Section 253(a). 47 U.S.C. 253(d). Accordingly, respondent Missouri municipalities and municipally-owned utilities petitioned the FCC, seeking an order declaring that the Missouri statute was preempted by Section 253(a). Pet. App. 14a-15a.[1]

a. The FCC denied the petition. Pet. App. 14a-41a. The FCC noted that it had previously rejected a similar petition that sought preemption of a Texas statute. *Id.* at 16a, citing *In re Public Utility Commission*, 13 F.C.C.R. 3460 (1997) ("*Texas Preemption Order*"). In that case, the City of Abilene petitioned the FCC to preempt a Texas statute that also forbade municipalities from providing telecommunications services. The FCC noted that "[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services" (13 F.C.C.R. at 3549). The FCC also "encourage[d] states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in [the Texas statute]" (*ibid.*).

Nonetheless, the FCC denied the petition, ruling that the Texas statute was not preempted. 13 F.C.C.R. at 3544. The FCC asserted that under this Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the term "any entity" in Section 253(a) had to be interpreted not to include "political subdivisions of the state" (13 F.C.C.R. at 3547; see *id.* at 3545). In *City of Abilene v. FCC*, 164 F. 3d 49 (D.C. Cir. 1999), the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision.

b. The Commission, relying in part on the *Texas Preemption Order*, denied respondents' petition as well. Pet. App. 14a-45a. The Commission stated that "the legal

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[1] "Pet. App." refers to the appendix to the petition in No. 02-1386.

authorities that we must look to in this case compel us to" reach that conclusion. *Id.* at 23a. But the Commission "reiterate[d its] urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service." *Ibid.*

The Commission explained that it had "found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry" and that "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a. The Commission noted that "municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services" (*id. at* 24a). The Commission rejected the argument that prohibitions on municipal entry could be justified by concerns about "regulatory bias when a municipality acts as both a regulator and a competitor" or about "taxpayer protection from economic risks" (*id.* at 25a); both of those concerns, the FCC said, "can be dealt with successfully through measures that are much less restrictive than an outright ban on entry" (*id.* at 25a-26a). The *Texas Preemption Order* had addressed only municipalities that provided telecommunications services; in rejecting respondents' petition, the Commission extended its ruling to municipally-owned utilities as well. *Id.* at 33a-35a.

3. The United States Court of Appeals for the Eighth Circuit unanimously vacated the Commission's order. Pet. App. 1a-13a. The Eighth Circuit assumed that *Gregory v. Ashcroft, supra,* "requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states" (Pet. App. 6a). The court of appeals also assumed that such a "plain statement" standard applied to Section 253(a). Pet.

App. 6a. Accordingly, the court reasoned, the first question before it was whether the "meaning" of Section 253(a) is "plain"—specifically, whether "the words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule" (Pet. App. 7a).

The court concluded that the words "any entity" do plainly include municipalities and municipally-owned utilities. Pet. App. 7a-13a. The court began by noting that "[t]here is no doubt that municipalities and municipally-owned utilities are entities under a standard definition of the term." *Id.* at 8a. The court quoted the Black's Law Dictionary definition of "entity"—"'[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members'"—and "public entity," "a 'governmental entity, such as a state government or one of its political subdivisions.'" Pet. App. 8a (brackets in original), quoting Black's Law Dictionary 553 (7th ed. 1999). The court of appeals recognized that municipalities are created by the States, and that the States exercise extensive control over them, but the court reasoned that "[t]he plain meaning of the term 'entity' includes all organizations, even those not entirely independent from other organizations." Pet. App. 8a.

The Eighth Circuit then added that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." Pet. App. 8a-9a. The court of appeals noted that "[t]ime and time again" this Court "has held that the modifier 'any' prohibits a narrowing construction of a statute." *Id.* at 9a. The court then cited nine decisions of this Court, including *Salinas v. United States*, 522 U.S. 52 (1997), which, as the Eighth Circuit explained, ruled in an analogous context that the use of the term "any" was a sufficiently plain statement to satisfy the rule of *Gregory v. Ashcroft*. Pet. App. 9a-10a. The court of appeals concluded that "because municipalities fall within the ordinary definition of the term

'entity,' and because Congress gave that term expansive scope by using the modifier 'any,' individual municipalities are encompassed within the term 'any entity' as used in § 253(a)." Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

I. If the words of Section 253(a) are given their plain meaning, then Section 253(a) preempts the Missouri statute. Municipalities and municipally-owned utilities are unquestionably "entities" in the ordinary meaning of that term. Municipalities can sue and be sued; they can enter into contracts and own property; for many purposes, federal law treats municipalities differently from States. This Court has, not surprisingly, routinely used the term "entity" when referring to political subdivisions of States.

Moreover, "any entity" is precisely the phrase Congress would have chosen if it was seeking to be as inclusive as possible: if it meant to foreclose any possibility that a State might exclude a potential entrant from providing telecommunications services. Petitioners point out that Acts of Congress often explicitly limit the term "entity," specifying that only "private entities" or "public entities" are intended. But that just demonstrates that when Congress does not limit or qualify the term—when it refers to "any entity"—it means to encompass all entities, public and private.

There are also powerful reasons, rooted in the pro-competition purposes of the Telecommunications Act, to interpret the phrase "any entity" in Section 253 to include municipalities. As the FCC itself emphasized, municipalities are a singularly important source of competition in telecommunications. The legislative history and the structure of the Telecommunications Act demonstrate that Congress knew of the potential importance of municipal entrants when it adopted Section 253, and that Congress intended to

protect the right of municipalities to enter telecommunications markets.

II. Interpreting Section 253(a) according to its plain meaning does not, contrary to petitioners, produce absurd results, such as empowering State officials to provide telecommunications services over the objection of the legislature. Section 253(b) explicitly reserves to the States ample authority both to avoid absurd or implausible results and to ensure that Section 253(a) will not constitute a substantial incursion on State sovereignty.

Section 253(a) also is not an unprecedented or extraordinary intrusion on the authority of States to regulate matters pertaining to their subdivisions, and it does not raise any substantial constitutional questions. On several occasions, this Court has considered claims that federal statutes limited States' authority over their subdivisions. The Court has sometimes accepted these claims, without ever suggesting that they presented any constitutional issue or any affront to values of federalism. Even when the Court has rejected claims that federal statutes limited States' control over municipalities, it has never suggested that the States' interest in controlling subdivisions could override the plain meaning of the statute, much less that the statute might be unconstitutional.

III. The principle of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), does not justify departing from the plain meaning of Section 253(a). The Court has squarely held that the *Gregory* presumption applies only when a statute is ambiguous, and Section 253(a) is not ambiguous. Even when a statute is ambiguous, the *Gregory* presumption does not automatically require that the statute be interpreted to bar the exercise of federal power.

At bottom, petitioners' contention is that Section 253(a) should not be interpreted to include municipalities and

municipally-owned utilities because Congress did not explicitly mention municipalities in that provision. The Court has never required such an explicit statement in any context, and the Court has rejected outright, on several occasions, the notion that *Gregory* requires such an explicit statement.

ARGUMENT

SECTION 253(a) PREEMPTS MISSOURI'S BAN ON MUNICIPAL ENTRY INTO TELECOMMUNICATIONS MARKETS.

I. Section 253(a), Interpreted According To Its Plain Meaning, Preempts The Missouri Statute.

A. Section 253(a) provides that "[n]o State * * * statute or regulation * * * may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). There is no dispute in this case that Missouri has enacted a statute that prohibits municipalities and municipally-owned utilities from "provid[ing] * * * telecommunications service." If municipalities or municipally-owned utilities are "entit[ies]" within the meaning of Section 253(a), then the Missouri statute is preempted.

Municipalities and municipally-owned utilities are—in the ordinary English usage of the term—unquestionably "entities." Indeed, this point is so clear that the federal petitioners appear not to dispute it. The Black's Law Dictionary definition, quoted by the court of appeals, explicitly defines "entity" to include subdivisions of state governments. The Oxford English Dictionary defines "entity" as "[a] thing that has a real existence, as opp[osed] to a relation, function, etc." The New Shorter Oxford English Dictionary 830 (1993). The dictionary definitions that petitioners quote are all to the same effect. See, *e.g.*, SW Bell Br. 21.

It would be very odd, as a matter of English usage, to say that municipalities and municipally-owned utilities do not have "a real existence" or—even using petitioners' definitions—that they do not "'exist[] as a particular and discrete unit'" (SW Bell Br. 21, quoting Webster's II New College Dictionary 376 (1999)). Petitioners Nixon and Southwestern Bell insist that political subdivisions are not entities because they "are part of the State and dependent upon it for any powers they may be authorized to wield." SW Bell Br. 21; see Nixon Br. 29. It is true, of course, that political subdivisions are created and empowered by the State. But once political subdivisions are created they are, in ordinary usage, "entities" with a "real existence."

Indeed, if municipalities and municipal utilities are not "entities" because they owe their existence and their powers to the State, then private corporations—which are also creatures of State law and also possess only those powers granted them by the State—would also not be "entit[ies]" under Section 253(a), and a State could freely exclude any private corporation from the telecommunications market. That result is obviously wrong, as even petitioners recognize. Similarly, petitioners assert that the term "any entity" is "most naturally read" to apply only to "companies that would otherwise be subject to state regulation" (SW Bell Br. 19). But this is not a "natural[]" reading at all, even leaving aside the fact that municipalities and, especially, municipally-owned utilities *are* "subject to state regulation."[2] Congress did not say "regulated entities," "entities subject to regulation," or anything of that sort. It used the all-inclusive term "any entity."

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[2] Indeed, petitioner Nixon, the Attorney General of Missouri, forthrightly states: "Missouri specifically authorizes, but also regulates, municipal utilities in Mo. Rev. Stat. Chapter 91." Nixon Br. 16.

Municipalities and municipally-owned utilities can sue and be sued. They can enter into contracts and own property. The Court has repeatedly ruled that municipalities do not partake of the States' sovereign immunity under the United States Constitution. See, *e.g.*, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890). That result would be incomprehensible if municipalities were not entities but just part of the "entity" that is the State. Congress has made municipalities—but *not* States—subject to suit under the Sherman Antitrust Act. Compare *Community Communications Co. v. Boulder*, 455 U.S. 40, 50-51 (1982), with *Parker v. Brown*, 317 U.S. 341 (1943). Congress has treated municipalities—but not States—as "persons," and therefore subject to suit, under 42 U.S.C. 1983. Compare *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), with *Will v. Michigan Department of State Police*, 491 U.S. 58 (2002). Under the False Claims Act, 31 U.S.C. 3729 *et seq.*, as well, municipalities are "persons" that can be sued but States are not. Compare *Cook County* v. *United States ex rel. Chandler*, 123 S. Ct. 1239 (2003), with *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). It is impossible to reconcile those results with petitioners' position that Congress does not regard municipalities as "entities."

But the point is far more basic than that. Simply as a matter of ordinary language, it would be eccentric to assert that the City of St. Louis, for example—or a utility owned by such a city—is not an "entity." Petitioner Southwestern Bell quotes this Court's statement in *Sailors v. Board of Education*, 387 U.S. 105, 107 (1967), that "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities." See Br. 21. But of course the Court's point was that political subdivisions are not "sovereign"—not that they are not "entities." See, *e.g.*, *United States v. Kagama*, 118 U.S. 375, 379 (1886). The

Court's unselfconscious use of the term "entities" in this context just demonstrates how natural it is to describe political subdivisions in that way. And, not surprisingly, the Court has routinely used the term "entity" to describe political subdivisions. See, *e.g.*, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001); *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[T]he principle of sovereign immunity bars suits against States, but not lesser entities."); *Monell*, 436 U.S. at 710 (Powell, J., concurring); *Mt. Healthy School District*, 429 U.S. at 280.

B. 1. In fact, the most conspicuous feature of the language of Section 253(a) is its inclusiveness. The language of Section 253(a) evinces a desire to foreclose any possible claim that some potential entrants into the telecommunications market are unprotected by Section 253(a)—the very claim that petitioners make here. The choice of the term "entity" is itself evidence of this: it is hard to think of any term that could be more inclusive. Congress did not choose a narrower and more ambiguous term, such as "person" (see, *e.g.*, *Cook County*, 123 S. Ct. at 1243-45); it did not try to list the various kinds of potential entrants into telecommunications markets that might be covered by Section 253(a). The distinguishing characteristic of the term "entity" is precisely its inclusiveness. It is the word one would use if one wanted to cover the waterfront and omit no possibilities.

If there is any doubt that Section 253(a), interpreted according to its plain meaning, is fully inclusive, that doubt is removed by Congress's use of the term "any." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). As the court of appeals noted, this Court has made this point about Congress's use of "any" not once or twice but many times.

The Court has repeatedly ruled that the modifier "any" precludes a narrow construction of the modified term.[3] The FCC itself recently urged this Court to interpret the word "any," in a provision of the Telecomunications Act, in just this way. See *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 331-32 (2002) (interpreting 47 U.S.C. 224(a)(4)).

Petitioners rely heavily on *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002). See FCC Br. 11, 15, 20, 23; SW Bell Br. 12-13, 25-27. *Raygor* ruled that claims brought against States and dismissed on grounds of State sovereign immunity did not fall within the phrase "any claim asserted" in the limitations-tolling provision of the supplemental jurisdiction statute, 28 U.S.C. 1367(d). But *Raygor*, and the Court's subsequent treatment of that case, actually refute petitioners' position. Last Term, in *Jinks v. Richland County*, 123 S. Ct. 1667 (2003), the Court considered the same phrase in the same statute. As applied in *Jinks*, Section 1367(d) partially overrode a State's decision to limit its subdivisions' liability to suit in State court under *State* law. *Jinks*, therefore, involved not State sovereign immunity but a claim closely parallel to petitioners' here: a claim that the statute "'interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.'" *Id.* at 1670 (citation omitted).

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[3] See, *e.g.*, *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002); *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 341-42 (2002); *Brogan v. United States*, 522 U.S. 398, 400-01, 405 (1998); *Salinas v. United States*, 522 U.S. 52, 57 (1997); *Freytag v. Commissioner*, 501 U.S. 868, 873-74 (1991); *United States v. James*, 478 U.S. 597, 605 (1986); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980); *Brotherhood. of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 529 (1947).

In that context—which, unlike *Raygor* but like this case, concerns a State's authority over its subdivisions—the Court unanimously ruled that the logic of *Raygor* did not apply. The Court held that "*any claim* asserted"—the emphasis is the Court's (123 S. Ct. at 1673)—is an inclusive phrase that reaches all claims against municipalities. *Ibid.*[4]

Petitioners insist that Section 253(a) was intended to do no more than "overturn state exclusive-franchise laws" (SW Bell Br. 10; see *id.* at 3, 16, 17; FCC Br. 3, 10, 17). But that is, quite plainly, not what Section 253(a) says. Congress could simply have banned States from providing exclusive franchises, in those terms, if that was all it wished to do.[5] Congress indisputably went beyond that; it prohibited barriers that prevent "any entity" from competing. As a matter of ordinary meaning, the modifier "any" means that the modified phrase is to be interpreted as expansively as language allows; the term "entity" is a notably inclusive term; and the phrase "any entity," if given its plain meaning, unquestionably includes municipalities and municipally-owned utilities. The meaning of Section 253(a) could hardly

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[4] In addition, in *Raygor* there was a genuine ambiguity in the statute, as the Court noted. See 534 U.S. at 544-45. It is entirely plausible to suppose that when Congress extends a statute of limitations for "any claim asserted," it does not mean to include claims that were asserted but were obviously groundless, or claims that were asserted in defective filings—or claims that were asserted in contravention of a constitutional immunity. In *Jinks*, there was no similar basis for limiting the scope of the phrase "any claim asserted"; and here, petitioners have failed to show any basis for limiting the phrase "any entity," which can be interpreted to encompass municipalities and municipal utilities without any tinge of absurdity or implausibility.

[5] Congress has, in fact, done so elsewhere, in the cable franchising provisions of Communications Act, the statute that the Telecommunications Act of 1996 amended. See, *e.g.*, 47 U.S.C. 541(a)(1) (A franchising authority "may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.")

be clearer. In this Court's words: "States may no longer enforce laws that impede competition" (*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 371).

2. Petitioner Southwestern Bell emphasizes that Congress often provides a specific definition of the term "entity" when that word occurs in a statute, and that those definitions sometimes include, and sometimes exclude, political subdivisions. See SW Bell Br. 22-24. These observations, which are accurate, further undercut petitioners' position. The fact that Congress sometimes explicitly defines the word "entity" to include political subdivisions shows that Congress sees no linguistic oddity in that usage. In addition, if Congress sometimes explicitly limits "entity" to public entities and sometimes limits the term to private entities, then when Congress provides *no* limit, the logical inference is, quite simply, that Congress did not intend to limit the term. It meant it to apply to all entities, public and private. Surely there is no basis for inferring, as Southwestern Bell would have it, that Congress deliberately left an ambiguity in the statute.

More generally, the fact that Congress provided no specific definition of "entity" in the Telecommunications Act must be taken to show that Congress wanted the term to be given its ordinary English meaning. See, *e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). If Congress had intended the term "any entity" to have a technical, esoteric meaning, or a contrived definition like the various ones petitioners propose, it would not have left the term undefined. And, as we have said, in its ordinary usage, "entity" includes municipalities and municipally-owned utilities.

C. Not only are municipalities and municipal utilities within the ordinary meaning of the phrase "any entity"; there are powerful reasons to interpret that phrase in Section 253(a)

to include municipalities and municipally-owned utilities that seek to provide telecommunications services. Municipalities and municipally-owned utilities are a singularly important source of competition in telecommunications markets; and Congress knew that when it enacted the Telecommunications Act.

1. The Federal Communications Commission itself provides the most compelling testimony to the competitive importance of removing barriers that would keep municipalities and municipal utilities out of telecommunications markets. In the *Texas Preemption Order*, the Commission went out of its way to "encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in [the Texas statute]." 13 F.C.C.R. at 3549. The Commission explained: "Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services." *Ibid.* The Commission rejected the notion that barriers to municipal entry were needed to deal with the issues that Texas had used to justify its statute, such as "issues regarding taxpayer protection" and "questions concerning possible regulatory bias"; the Commission stated that "these issue can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition." *Ibid.*

In the proceedings below, the Commission was even more emphatic in describing the importance of municipalities to telecommunications markets and in rejecting the supposed rationales for the Missouri statute. The Commission made clear that it was declining to preempt the Missouri statute only because it believed that this Court's decisions and the District of Columbia Circuit's decision in *Abilene* required it to do so: "[T]he legal authorities that we must look to in this case compel us to" reach that conclusion, the Commission said, despite the damage done by the Missouri statute. Pet.

App. 23a. The Commission noted that it "has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry." *Ibid.* (citation omitted).

Specifically, the Commission said, "entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." Pet. App. 23a. That is because, the Commission found, "municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services." *Id.* at 24a. The Commission noted a case study it had conducted, in Muscatine, Iowa, where consumers had exceptional access to advanced telecommunications services "due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services." *Ibid.* The Commission further noted that "[m]unicipally-owned utilities also serve large cities, including Los Angeles, Seattle, Cleveland, and San Antonio, and are also potential competitors in these areas." *Id.* at 24a n. 34.[6] The Commission also, as it had in the Texas case, debunked the policy arguments that were offered in defense of the Missouri law: "[I]ssues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor * * * can be dealt with successfully through measures that are much less restrictive than an outright ban on entry" (*id.* at 25a-26a).

In separate statements, three Commissioners—a majority of the Commission—were more emphatic still. Chairman

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[6] Further evidence about the importance of municipal entrants to telecommunications markets is provided in the briefs submitted by, respectively, amici curiae Knology, Inc.; High Tech Broadband Coalition and Fiber to the Home Council; Consumers Federation of America; and Educause.

Kennard and Commissioner Tristani noted that they voted "reluctantly" to deny preemption because that result, which "effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri" is "legally required [but] is not the right result for consumers in Missouri." Pet. App. 42a. Eliminating barriers to municipal entry, the Commissioners said, "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." *Id.* at 43a. Commissioner Ness, in a separate statement, emphasized that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas" (*id.* at 44a) and stated that the Commission's decision "does not indicate support for a policy that eliminates competitors from the marketplace." *Id.* at 43a.

The petitioners, including the federal petitioners, conspicuously do not argue that the FCC's decision in this case is entitled to deference under the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Their decision not to invoke *Chevron* is understandable, and proper: The FCC's ruling in this case rested not on an independent determination of the appropriate scope of the phrase "any entity" but rather on the FCC's belief that the decisions of this Court and the District of Columbia Circuit compelled it to deny preemption. The FCC made it entirely clear that, were it not for what the Commission perceived as the mandate of those decisions, it would have preempted the Missouri statute.

In fact, to the extent the doctrine of *Chevron* and similar cases requiring deference to agency determinations rests on the agency's comparative expertise (see, *e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 703 (1995)), those cases dictate that the term

"entity" should be interpreted to extend to municipalities and municipal utilities. On the question of which interpretation of Section 253(a) would best promote competition and best serve the purposes of the Telecommunications Act—the question that implicates the FCC's expertise—the FCC's judgment was unequivocal, and it was unequivocally opposed to the Missouri statute. The FCC left no doubt whatever that, in its expert view, interpreting "any entity" to include municipalities and municipally-owned utilities would best promote competition and best serve the purposes of the 1996 Act. The FCC also left no doubt of its view that the objectives purportedly served by the Missouri statute could be equally well served "through measures that are much less restrictive than an outright ban on entry." Pet. App. 26a. The policies underlying *Chevron* and similar decisions, therefore—like the plain meaning of Section 253(a) and, as we are about to demonstrate, the legislative history—dictate that the Missouri statute should be preempted.

2. When Congress adopted Section 253(a) as part of the 1996 Act, it was well aware of what the FCC later emphasized—that municipalities and municipal utilities are extremely important potential competitors in telecommunications markets. There is incontrovertible evidence that Congress intended to enable utilities to enter, and compete in, telecommunications markets. And the Act itself demonstrates that Congress knew that many utilities are owned or operated by municipalities (something that is common knowledge in any event). Congress differentiated between public and non-public utilities in some provisions of the Act—but Section 253(a) makes no such distinction, and at no point did Congress show any inclination to differentiate among these different kinds of utilities for purposes of removing barriers to entry.

a. The legislative history of the Telecommunications Act could not be more explicit in stating that utilities are among

the "entities" whose right to enter telecommunications markets is protected by Section 253(a). The Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act stated that "explicit prohibitions on entry by a utility into telecommunications are preempted under this section." H. R. Rep. 104-230, 104th Cong., 2d Sess. 127 (1996) ("House Report"). The Senate Report that accompanied the provision that became Section 253(a) explained, in its summary of the major features of the bill, that this provision "allows all electric, gas, water, ste[a]m, and other utilities to provide telecommunications" (S. Rep. 103-367, 103d Cong., 2d Sess. 22 (1994) ("Senate Report")).[7] Elsewhere the Senate Report discussed at great length the importance of electric utilities as potential competitors in telecommunications markets. See Senate Report 10-11. See also Senate Report 55: "If an electric utility * * * provides telecommunications services, it will be considered a telecommunications carrier for those services."[8]

Petitioner Southwestern Bell suggests (Br. 18) that perhaps Congress was unaware that municipalities own or operate electric utilities. That claim is implausible on its face: There are over 2000 public power utilities in the United States, located in every state except Hawaii. By way of contrast, there are approximately 200 investor-owned utilities. (There are also 900 rural electric associations.) American Public Power Ass'n, 2003 Annual Directory & Statistical Report 13.

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[7] As we explain below, the provision that became Section 253(a) originated as Section 302 of S. 1822, 103d Cong., 2d Sess. (1994) (adding Section 230(a)). This provision was discussed in the Senate Report. Section 253(a), as enacted, is identical is all relevant respects.

[8] For a more detailed account of the legislative history, see the brief of amici curiae International Municipal Lawyers Association, National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Counties and United States Conference of Mayors.

In any event, the notion that Congress was unaware that municipalities often own utilities is belied by the Act itself. The Telecommunications Act of 1996 amended the Pole Attachments Act, 47 U.S.C. 224, by adding a definition of "utility." 110 Stat. 150; see 47 U.S.C. 224(a)(1) ("[A]ny person who is a local exchange carrier or an electric, gas, water, steam or other public utility * * * "); *National Cable & Telecommunications Ass'n, Inc*, 534 U.S. at 332. But the Telecommunications Act specifically limited the definition of "utility"—"[a]s used in this section"—by excluding "any person owned by * * *any State", or any political subdivision. 47 U.S.C. 224(a)(1).[9] This is unequivocal evidence, in the text of the Act, that Congress was aware that many utilities—whose entry into telecommunications markets was one of the prime objectives of Section 253(a)—were owned by public entities, including municipalities.

In sum, Congress unquestionably intended utilities to be among the "entities" protected by Section 253(a); Congress was well aware, as anyone would be—and its awareness is reflected in the Telecommunications Act itself—that utilities are often owned by municipalities; Congress exempted municipally-owned utilities from one provision of the Act; and Congress did not exempt municipally-owned entities from Section 253(a), instead using the inclusive phrase "any entity." The conclusion is clear that Section 253(a) protects the right of municipalities to enter telecommunications markets.

b. There is a specific legislative history on this issue that places Congress's intentions even further beyond doubt. The provision that became Section 253(a) of the Telecommunications Act of 1996 originated in S. 1822, 103d Cong., 2d Sess. (1994), the proposed Telecommunications Act of 1994. At

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[9]The term "State" is defined elsewhere in the Act to include political subdivisions. See 47 U.S.C. 224(a)(3).

the hearings on S. 1822, a witness testified about the contributions that municipal utilities had made, and could make in the future, in providing telecommunications services to communities that were underserved by private sector firms. See *The Communications Act of 1994: Hearings on S. 1822 Before the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 351-60 (1994) ("S. 1822 Hearings").

After that testimony, Senator Lott, a Senate manager of the Telecommunications Act (House Report 110), stated: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." S. 1822 Hearings at 379. The "language" that appeared in S. 1822 was "any entity," in a provision that is identical in all relevant respects to the language of Section 253(a): "no State or local statute or regulation * * * may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." S. 1822, § 302, adding 47 U.S.C. 230(a); see Senate Report 141. That language, interpreted according to its plain meaning, accomplishes the result that was Congress's manifest intention: it prohibits States from barring municipal entry into telecommunications markets.

II. Enforcing Section 253(a) According To Its Plain Meaning Does Not Produce Implausible Results And Does Not Raise Constitutional Questions.

Perhaps aware that the language of Section 253(a) is unequivocal, petitioners offer various arguments designed to show that interpreting the statute according to its plain meaning would lead to results Congress could not have intended. These arguments of petitioners' fall into two categories. First, petitioners suggest that interpreting Section

253(a) according to its plain meaning would produce a variety of obviously absurd results—such as enabling a mayor to provide telecommunications services over the objections of the town council (SW Bell Br. 19), or permitting various special purpose districts or components of the State government to "enter[] the commercial telecommunications business" (Nixon Br. 30). Second, petitioners urge that applying Section 253(a) to municipalities and municipally-owned utilities would work such an extraordinary and unprecedented invasion of state sovereignty that Congress cannot be supposed to have intended to do so. Both of these arguments are demonstrably incorrect.

A. Section 253(a), interpreted according to its plain meaning, does not produce implausible results.

1. Petitioners' first set of assertions—that interpreting "any entity" to mean "any entity" would produce results that are absurd by anyone's lights—is conclusively refuted by Section 253(b), a provision that petitioners fail to mention when they make these arguments. In enacting the 1996 Act, Congress conjoined the unequivocal prohibition of Section 253(a) with Section 253(b)'s explicit preservation of substantial State authority. In that way, Congress ensured that Section 253(a) would not produce results that are absurd, or that constitute an excessive incursion on State sovereignty. Section 253(b) provides:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

By virtue of Section 253(b), a State may—of course—allocate responsibilities among various government officials and agencies without having to authorize each of them to

provide telecommunications services. And a State is free to limit local governments' commercial activities and otherwise to structure local governments in any way it sees fit—subject only to the condition that, if it erects a barrier to entry into the telecommunications market, it must meet the standards of Section 253(b).

There is, accordingly, nothing absurd at all about interpreting Section 253(a) according to its plain meaning. Compare *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978).There is no need for judicial rewriting of the Telecommunications Act to provide needed flexibility: Section 253(b) provides the flexibility that Congress intended. And, contrary to petitioners, there is no basis for regarding Section 253(a)'s reference to "any entity" as being in the least bit ambiguous or equivocal.

2. For the same reasons, petitioners are utterly mistaken in their repeated assertions that Section 253(a), interpreted according to its plain meaning to prohibit barriers to municipal entry, would bring about an "extreme result" (SW Bell Br. 10) by "interfer[ing] with a fundamental aspect of state sovereignty" (FCC Br. 9) and would "strike at the heart of the sovereignty of the States" (SW Bell Br. 15). Section 253(a) is unequivocal in its application to "any entity" but—because of Section 253(b)—appropriately limited in its impact on State sovereignty. Petitioner Southwestern Bell freely acknowledges that Section 253(b) "expressly preserve[s] States' authority under state law to pursue important policies of local concern * * * even if those policies might be inconsistent with section 253(a)." SW Bell Br. 20. Petitioner Southwestern Bell somehow draws the inference that Section 253(a) therefore cannot be interpreted to mean what it says. See SW Bell Br. 11, 20; see also *City of Abilene v. FCC*, 164 F. 3d 49, 53 (D.C. Cir. 1999). But the proper inference is exactly the opposite: the preservation of

State regulatory authority in Section 253(b) establishes that Section 253(a) poses no threat to State sovereignty.

In fact, far from Section 253(a) constituting a substantial incursion on State sovereignty, petitioners and their supporting amici have failed to identify *any* legitimate State interest that Section 253(a) prevents them from pursuing. Petitioners defend the Missouri statute's barrier to entry by invoking abstract ideas of State sovereignty. But the Federal Communications Commission itself explicitly stated in the proceedings below—echoing statements it had made in the Texas case—that any legitimate interests adduced by petitioners in support of the Missouri law could be promoted by State laws that are "much less restrictive than a barrier to entry." Pet. App. 25a-26a. The Commission pointed to Section 253(b), which allows States to address alleged abuses;[10] the Commission also mentioned its own power to preempt any municipal law or regulation that is exclusionary or anticompetitive. See Pet. App. 25a-26a & n. 38. At no point in the proceedings below did the Commission identify a single legitimate interest that is served by the flat exclusionary barrier of the Missouri statute.

B. Section 253(a), interpreted according to its plain meaning, is not an extraordinary incursion on State sovereignty.

Petitioners also assert that Section 253(a), interpreted according to its plain meaning, would constitute such a "serious inroad on an area central to state sovereignty" (FCC Br. 11) that Congress could not have intended it. Indeed,

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[10] We do not concede the legitimacy of the concerns asserted by petitioners and their amici; for a refutation of the charges made by petitioner Southwestern Bell and amici Sprint Corp. and USTA, et al., see the brief of amicus curiae Consumers Federation of America. For historical background, see the brief of amicus curiae Lincoln Electric System.

petitioner Nixon argues (Br. 9-25) that Section 253(a) would be unconstitutional if interpreted in that way. These contentions, too, are groundless.

1. It is not an extraordinary thing for Congress to do what it did in Section 253(a): to grant (or deny) local governments certain limited powers, notwithstanding State law to the contrary. This Court has decided several cases in which parties contended that Acts of Congress did exactly that. On at least one such occasion, the Court agreed, and ruled that Congress had granted local governments certain prerogatives that State law could not override. *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985). On other occasions, the Court has interpreted Acts of Congress in a way that resulted in their "interfering in a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18)—but the Court gave no indication that this constituted a troubling affront to State sovereignty.

Even when the Court has rejected a claim that Congress has limited States' power to allocate authority among local governments, the Court has never suggested that it would be unprecedented for Congress to do so, or that the Court would override plain language that indicated that Congress wished to do so. Rather, the Court has used the usual methods of statutory interpretation to determine whether Congress intended to take such a step. The "traditional prerogative of the States to delegate [or withhold] * * * authority to [or from] their constituent parts" (*City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 429 (2002)), has played a role in the analysis; but it is just one factor among many that the Court has considered in interpreting the statute. So far as we are aware, no Member of the Court has ever suggested that a concern with this aspect of State sovereignty could justify disregarding the plain meaning of statutory language, much less that it would be unconstitutional for

Congress to grant limited powers to a local government if a State law were to the contrary.

a. In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempted local governments' regulation of pesticides. A provision of FIFRA specifically stated that "'A State may regulate the sale or use of any federally registered pesticide * * *.'" 7 U.S.C. 136v, quoted in *Mortier*, 501 U.S. at 606 (ellipsis added). The Court addressed the question whether this reference to a State impliedly authorized local governments, as well, to regulate pesticides.

This question is parallel to the issue here. In both *Mortier* and this case, the issue is whether Congress intended to override States' decisions about the powers their subdivisions could exercise. In *Mortier*, the question was whether Congress could override a State's decision to grant powers to its subdivisions; here, the question concerns a State's effort to withhold powers from its subdivisions. But those questions implicate the same State sovereignty concerns.[11] Both involve "[t]he ability of States to define the authority of their own political subdivisions" (Nixon Br. 6) and a potential "interfer[ence] in a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18). Indeed, petitioners rely heavily on both *Mortier* and *City of Columbus v. Ours Garage and Wrecker Service, supra*, which involved the same kind of question as *Mortier*.

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[11] In fact, as we explain below, *Mortier* and *City of Columbus v. Ours Garage and Wrecker Service, supra*, implicate State sovereignty much more directly than Section 253(a) does. That is because those cases concerned the States' control over their subdivisions' regulatory powers, not just over the subdivisions' commercial activities. See pages 28-29.

The Court in *Mortier* explained that, in order to establish preemption—that is, in order to conclude that Congress had overridden a State's decision about how to allocate authority among its subdivisions—the following showing would have to be made:

> [I]t would * * * have to be shown *under ordinary canons of construction* that FIFRA's delegation of authority to "State[s]" would not * * * allow the States in turn to redelegate some of this authority to their political subdivisions * * *.

501 U.S. at 612 (first brackets and emphasis added). Consistent with this view, the Court carefully analyzed both the statutory language and the legislative history before concluding that, all things considered, the better interpretation of FIFRA did not preclude States from delegating authority to local governments. The Court never suggested that it would strain to interpret the language to avoid concluding that Congress meant to override the State decision. The Court never remotely suggested that the conclusion that States could not delegate authority would raise constitutional issues or would be such an extraordinary incursion on State sovereignty as to be almost unthinkable. The Court did mention the principle that, traditionally, States determine what powers their subdivisions will exercise (501 U.S. at 607-08). But this was just one factor among many in the Court's analysis.

b. In *City of Columbus, supra*, the Court addressed a similar question. The Interstate Commerce Act preempts both State and local regulation of prices, routes, and services of motor carriers with respect to the transportation of property, 49 U.S.C. 14501(c)(1), but an exception to that preemption provision—49 U.S.C. 14501(c)(2)(A)—specifies that "the safety regulatory authority of a State" is not preempted. The question was whether a State could delegate such regulatory authority to a local government. The Court again analyzed the statute with care, noting indications in the statutory language

pointing in both directions. See 536 U.S. at 434-36. The States' traditional power to decide what powers to delegate to their subdivisions played a role in the Court's analysis, but, again, only in combination with the other indications of legislative intent. See *id* at 432-42.

All the Members of the Court in *City of Columbus* recognized that federal statutes frequently limit States' power over their subdivisions. The majority in *City of Columbus* acknowledged that numerous federal spending programs "explicitly restrict the prerogatives of States to entrust governance of a matter to localities." 536 U.S. at 438. The dissenting opinion agreed, stating that "it should not be thought that the States' power to control the relationship between themselves and their political subdivisions * * * has hitherto been regarded as sacrosanct" (*id.* at 448 (opinion of Scalia, J., joined by O'Connor, J.)) and enumerating "many significant federal programs" that limit the States' power to control the authority that subdivisions may exercise. See *id.* at 448-49. Again there was no hint of a suggestion, by any Justice, that the interpretation supported by the dissent would create a constitutional question.

The issue in *Mortier* and *City of Columbus*—whether Congress had limited the States' power to delegate regulatory authority to its subdivisions—in fact implicated State sovereignty far more directly than does any issue presented by Section 253(a). In *Mortier* and *City of Columbus*, the claim was that Congress had deprived a State of the power to allocate regulatory authority as it saw fit. By contrast, Section 253(a) concerns not a State's power to delegate regulatory authority but rather only limitations on commercial activity by political subdivisions. See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991).

Regulatory authority is the defining feature of government; it is precisely the power that distinguishes the government from a private entity. An Act of Congress that "interfer[es] in

a State's internal allocation of authority among itself and its political subdivisions" (FCC Br. 18) implicates State sovereignty to a far more significant degree when State regulatory authority is at stake—as it was in *Mortier* and *City of Columbus*—than when, as here, the State is not allocating its regulatory authority but only controlling the commercial activity of its subdivisions. Nonetheless, the Court in *Mortier* and *City of Columbus* did not suggest that the possibility of a Congressional "interference" with the State's authority would justify overriding the plain meaning of a statute, or even that any ambiguity would automatically be resolved in a way that preserved the State's authority. The Court used "ordinary canons of [statutory] construction" (*Mortier*, 501 U.S. 612), in both cases, considering State sovereignty as just one among several factors that shed light on the proper interpretation of the federal statute. It follows *a fortiori* that this case should also be resolved according to "ordinary canons of statutory construction."

c. In *Lawrence County v. Lead-Deadwood School District*, *supra*, the Court held that an Act of Congress—one that the Court did not find to be clear on its face—did empower local governments to disregard a State statute that restricted their authority. The Payment in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, provides for payments to local governments and specifies that the local government "may use the payment for any governmental purpose." 31 U.S.C. 6902(a). A South Dakota statute specified how the funds received by localities were to be spent. See 469 U.S. at 259. The Court held that the State statute was preempted. *Id.* at 258.

The Act of Congress involved in *Lawrence County* was not clear on its face. As a matter of plain language, the provision that a local government "may use the payment for any governmental purpose" certainly could be interpreted to limit the local government to purposes that State law authorizes. Indeed, the Court in *Lawrence County* acknowledged as

much. See 469 U.S. at 261 ("At the very least, [the provision] is ambiguous with respect to the degree of discretion it confers on local governments."). After examining the background, the legislative history, and other provisions of the Act, the Court concluded, on balance, that Congress intended to preserve local autonomy against State law. See *id.* at 261-70.

Lawrence County disposes of any suggestion that federalism concerns compel the Court to interpret "any entity" in Section 253(a) to exclude municipalities and municipally-owned utilities. Section 253(a), unlike the statute at issue in *Lawrence County*, is not the least bit ambiguous. Nothing in the language or legislative history of the Telecommunications Act suggests that Congress meant to exclude municipalities and municipally-owned utilities from the protection of Section 253(a). There is no reason to believe that the incursion on State sovereignty in this case is more significant than in *Lawrence County*. There is, accordingly, simply no basis for the Court to read an exclusion into Section 253(a).[12]

d. In other areas as well, the Court has interpreted Acts of Congress to affect "the ability of States to define the authority of their own political subdivisions" (Nixon Br. 6). In many of

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[12] As the Court has pointed out (see *City of Columbus*, 536 U.S. at 438), *Lawrence County* involved a federal grant program, enacted under the Spending Clause; the Telecommunications Act was enacted under the authority of the Commerce Clause. But this does not provide a reason for the Court to rewrite the language of Section 253(a). In fact, under the doctrine of *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981), restrictions that Spending Clause legislation imposes on the States are to be interpreted especially strictly. That is, the Court should be especially reluctant to resolve ambiguity in Spending Clause legislation in a way that contravenes State interests. *Ibid.* The Court in *Lawrence County* did so. There is, accordingly, no reason to read an exception into the unambiguous language of non-Spending Clause legislation like Section 253(a).

these areas, the governing principles are very well established, and there has never been any suggestion that these principles constitute objectionable or extraordinary inroads on State sovereignty.

For example, as we have mentioned, while a State is protected from suits under federal law by a constitutionally-based sovereign immunity, municipalities do not share that immunity. See, *e.g.*, *Alden*, 527 U.S. at 756. The result of this limitation is that States are significantly constrained in how they allocate powers. If a State wishes a power to be exercised free of the risk of liability, it must retain the power in "an arm of the State" (*Mt. Healthy City School District*, 429 U.S. at 280); it cannot delegate that power to a political subdivision. See, *e.g.*, *id.* at 280-81. The Court has characterized this as an "important limit" on State sovereign immunity (*Alden*, 527 U.S. at 756) and has never suggested that the resulting "interfer[ence] in a State's internal allocation of authority" (FCC Br. 18) is somehow problematic.

Moreover, as we have noted, Congress has even restricted the power of a State to define the immunity of its subdivisions from a suit based on *State* law, in State court. *Jinks v. Richland County*, *supra*. In *Jinks*, a unanimous Court flatly rejected the contention that the Act of Congress imposing this restriction should be subject to a clear statement rule because it constituted "an encroachment on 'state sovereignty.'" 123 S. Ct. at 1673. The Court also denied that any constitutional question was raised by that federal limitation on a State's capacity to protect its subdivisions from liability under State law. *Ibid.* If Congress may, without raising any significant constitutional issues and without even making a "clear statement," subject State subdivisions to liability under State law—notwithstanding the contrary dictates of State immunity principles—then it is difficult to see why Section 253(a) should raise substantial concerns.

The antitrust laws impose a similar limitation on States' authority to allocate power among their subdivisions. As we have noted, anti-competitive measures enacted by the States do not give rise to liability under the Sherman Antitrust Act. *Parker v. Brown*, 317 U.S. 341 (1943). But a State may not simply delegate the power to enact such measures to political subdivisions. See, *e.g.*, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). A State may delegate this power only in the way specified by federal law—by establishing a "clearly articulated and affirmatively expressed state policy" to supersede competition. See *id.* at 52; *Hallie v. City of Eau Claire*, 471 U.S. 34, 40-41 (1985). This limitation on "[t]he ability of States to define the authority of their own political subdivisions" (Nixon Br. 6) also has never been thought to require resort to special rules of statutory interpretation.

2. Petitioners rely extensively in this Court's statements in cases such as *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), to the effect that the powers of municipalities "rest[] in the absolute discretion of the State." *Id.* at 178. See, *e.g.*, Nixon Br. 12, 14, 16; FCC Br. 14. But *Hunter* and the cases that make similar statements involved claims that various constitutional provisions gave municipalities, or their officials, rights against the States. None of those cases dealt with an Act of Congress that limited State authority over municipalities.[13] In fact, the Court's opinion in *Sailors v. Board of Education, supra*, which petitioners repeatedly cite for the proposition that States have plenary power over their subdivisions, went out of its way to say—twice—that a State may not use that power in a way that "defeat[s] a federally

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[13] See, *e.g.*, *Hunter*, 207 U.S. at 176-77 (Contract and Due Process Clauses of the Constitution); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (Contract, Due Process, and Just Compensation Clauses); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 629-30 (1819) (Contract Clause).

protected right" or "runs afoul of a federally protected right" (387 U.S. at 108, 109). Here, as we have shown, Congress has created such a right, in plain terms.

C. Interpreting Section 253(a) to preempt the Missouri statute raises no substantial constitutional questions.

Petitioner Nixon and petitioner Southwestern Bell nonetheless assert that Section 253(a) would be unconstitutional if it were interpreted, in accordance with its plain meaning, to prohibit States from establishing barriers to municipal entry. See SW Bell Br. 15 n.10; Nixon Br. 9-25. This argument has no foundation whatever. It certainly may be the case that some extreme federal intrusions into a State's decision about how to organize its internal affairs would violate the Constitution. See, *e.g.*, *Coyle v. Oklahoma*, 221 U.S. 559 (1911). But as we have said, Section 253(a) imposes only the most limited, and reasonable, restriction on State authority. In the cases we discussed that involved similar or more significant limitations, not a single Justice—on either side of the question of how the statute should be interpreted—suggested that it would be unconstitutional for Congress to limit State power in this way. Nor are we aware of any such suggestion in any other case.

Petitioner Southwestern Bell and petitioner Nixon suggest that Section 253(a) "'commandeer[s]'" State governments (SW Bell Br. 15 n.10; citation omitted) in violation of this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). See also Nixon Br. 23-25. But Section 253(a) does not commandeer any State because it does not compel any State to *do* anything. It requires the States only to *refrain* from enacting anti-competitive barriers to entry.

Southwestern Bell boldly asserts that Section 253(a) constitutes commandeering because, by preventing States

from erecting barriers to entry, Section 253(a) "effectively conscript[s] the governments of the States into assisting with Congress's plan to inject competition into local telecommunications markets." SW Bell Br. 15 n.10. If forbidding a State to interfere with an otherwise constitutional federal program constitutes "commandeering," then—by Southwestern Bell's logic—no Act of Congress could ever preempt any State law.

D. Interpreting Section 253(a) not to apply to municipalities would create anomalies.

It is petitioners' interpretation of Section 253(a)—not the Eighth Circuit's—that would create anomalies. Petitioners would import into Section 253(a) a distinction between entities that are "political subdivisions" of States and those that are not. But it is far from apparent how this distinction—reflecting, as it does, nothing in the language of the statute—is to be drawn.

Municipalities can be involved in provision of telecommunications services in wide variety of ways. Some municipalities provide such services themselves through a department or agency. Others establish and own a separate utility and control it directly through, for example, a city council. In other instances, municipal officials do not control the utility directly but appoint the governing board. In still other cases, the city has created an entity whose board is composed of independently elected members. Or a utility might be governed by some combination of these arrangements, in which certain corporate decisions are made by municipal officials and others by an independent board. Telecommunications services might also be provided by a joint venture between a municipal utility and a private firm—a joint venture that itself might take a variety of forms. Or a municipality might create and own a non-profit corporation or invest in a private firm and thereby exercise a degree of control over its operations.

Under petitioners' approach, the Federal Communications Commission would be forced to decide which of these business models constituted a "political subdivision" and which is instead an "entity." In this case, the FCC declared that the crucial question was whether the service provider "has an independent corporate identity" (Pet. App. 23a) or—what the Commission apparently considered the same thing—"a separate juridical personality" (*id.* at 35a). But these notions, too, are hardly self-defining and, like the term "political subdivision," occur nowhere in the Act. As a result, the FCC undertook a detailed examination of Missouri law to determine that the utilities in this case did not meet its standard. See *id.* at 32a-34a.

This approach—which petitioners' view would compel the FCC to take—is anomalous in at least two respects. First, it makes the determination of what constitutes an "entity" dependent on the particular features of State law, a result that Congress could not have intended. Section 253(a) is a limit on State power. It is highly unlikely that Congress, having made a considered determination to prevent States from barring "any entity" from telecommunications markets, would then permit States to determine the scope of their own power by incorporating State law definitions of what constitutes an "entity."

Second, and perhaps more important, it is anomalous for the Federal Communications Commission to be making these determinations of what constitutes a "political subdivision" or a "separate juridical personality"—as opposed to the determination we believe the Commission should make, which is whether a State regulation is "competitively neutral" and otherwise complies with Section 253(b). The Commission has no special expertise in local government law. The Commission is, however, expert in matters concerning competition in telecommunications markets.

The point, of course, is not that distinctions between governmental and private institutions are impossible to draw. Rather the question is one of how Congress intended Section 253(a) to be construed. There is no reason at all to believe that Congress, when it directed the FCC to preempt State laws that violate Section 253, envisioned that the Commission would make fine-grained decisions about whether an entity is a "separate juridical personality," as petitioners would require. It is far more plausible to suppose that Congress intended Section 253(a) to apply to all entities, whether or not they were "political subdivisions," and intended the Commission to determine, under Section 253(b), whether measures restricting entry were competitively neutral and otherwise in compliance with Section 253(b).

III. The Principle Of *Gregory v. Ashcroft* Does Not Require The Court To Disregard The Plain Meaning Of Section 253(a).

Finally, petitioners assert that, under the principle of *Gregory v. Ashcroft*, *supra*, the Court may not interpret Section 253(a) according to its plain meaning but should instead insist on a more explicit statement—specifically, a more explicit statement of Congress's intention to prohibit State laws that prevent municipalities and municipal utilities from entering telecommunications markets. This contention is wrong for a number of reasons.

First, the presumption of *Gregory v. Ashcroft* applies only when a statute is ambiguous. The Court established this point unequivocally in *Salinas v. United States*, 522 U.S. 52, 60 (1997) (the principle of *Gregory* does "not apply when a statute [i]s unambiguous"); it is, in any event, clear from *Gregory* itself. Section 253(a) is not ambiguous. Second, even when the *Gregory* presumption does apply, it does not automatically require that every ambiguity be resolved by limiting the scope of the Act of Congress. As we have explained, in a number of cases the Court has made clear that

the effect of federal legislation on the internal allocation of power within a State is a factor to be considered in determining the proper interpretation of an ambiguous statute but is not necessarily decisive.

At bottom, petitioners' claim—although they do not fully avow it—is that the prohibition contained in Section 253(a) cannot apply to municipalities and municipally-owned utilities unless Congress explicitly refers to municipalities in the text of the statute. The Court has never imposed that kind of rigid rule on Congress—even in cases dealing with State sovereign immunity, where federalism concerns are arguably at the highest level. And the Court has repeatedly *rejected* the notion that *Gregory v. Ashcroft* requires such an approach.

A. 1. As we have demonstrated, Section 253(a), interpreted according to the ordinary methods of statutory construction, is simply not ambiguous. The word "entity," in ordinary usage, includes municipalities and municipally-owned utilities; the phrase "any entity" is the one that Congress would naturally choose if it intended to be as inclusive as possible; in light of the other parts of Section 253, there is no reason not to give Section 253(a) its ordinary meaning; and other provisions of the Telecommunications Act, as well as the legislative history and the statements of the Commission, all reinforce the conclusion that "any entity" should interpreted to reach municipalities and municipally-owned utilities.

Because Section 253(a) is unambiguous, the presumption of *Gregory v. Ashcroft* should play no role in this case. "*Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous." *Salinas*, 522 U.S. at 60; see *Gregory*, 501 U.S. at 470 ("[T]he plain statement rule we apply today * * * [is] to be applied where statutory intent is ambiguous."). Petitioners suggest that Section 253(a) is ambiguous because, according to them, it does not say with absolute explicitness that municipalities and municipally-owned utilities are included in the category

"any entity." See SW Bell Br. 18-20; Nixon Br. 28-29; FCC Br. 20-21. But as the Court ruled in *Salinas*, statutory language does not become ambiguous just because it does not anticipate, and put beyond all doubt, every question that might arise. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60. And, as we explain below, petitioners are wholly misguided in their notion that Section 253(a) cannot apply to a municipality because it does not use that word explicitly.

2. Even if Section 253(a) were ambiguous, *Gregory v. Ashcroft* would not entitle petitioners to prevail. *Gregory v. Ashcroft* does not require that an ambiguity automatically be resolved against Congress's effort to empower local governments. Certainly that is true in a case of this kind, where, as we have explained, the incursion on State sovereignty—especially in view of Section 253(b)'s preservation of State authority—is limited. Rather, the *Gregory* presumption is just one element to be weighed in the balance in determining Congress's intent. The Court's approach to the cases that presented issues similar to this one—*Lawrence County*, *Mortier*, and *City of Columbus*—establishes this.

If petitioners' interpretation of *Gregory v. Ashcroft* were correct, then each of those cases would have been very easy for the Court to resolve—and *Lawrence County* would have come out the other way. In each of those cases, the text of the statute was not unambiguous; in *Lawrence County*, the Court explicitly recognized that it was not. If *Gregory* automatically required that ambiguities be resolved in favor of protecting the State's sovereign interests, then the Court had no need to inquire so carefully into all the indicia of legislative intent, as it did in each of those cases.

This point is particularly clear in *City of Columbus*, which was decided after *Gregory*. The Court in that case, after

acknowledging that the language of the statute presented a close question, proceeded to analyze the statutory language and structure, using—as the Court had said in *Mortier* (501 U.S. 612)— "ordinary canons of [statutory] construction." See *City of Columbus*, 536 U.S. at 433-36. In fact, the Court in *City of Columbus* did not rely on *Gregory*. Federalism concerns did play a role in *City of Columbus*, but they were not in themselves dispositive; the Court treated those concerns, in common sense fashion, as indications of Congress's intent, to be considered along with other such indications. If petitioners' view of *Gregory* were correct, the Court in *City of Columbus* need only have noted the ambiguity of the statute and then immediately proceeded to the conclusion. That is not at all how the Court viewed the case.

B. At bottom, petitioners' error is their view that Section 253(a) cannot apply to municipalities because Congress does not explicitly mention municipalities in that provision. Petitioners never quite acknowledge that this is what they are demanding.[14] But time and again, petitioners' strategy for trying to show "ambiguity" in Section 253(a) is to say that Congress could have defined "entity" explicitly to include political subdivisions. See, *e.g.*, SW Bell Br. 11, 22-23, 24; FCC Br. 23-24. And petitioners never explain what, in their view, could possibly satisfy *Gregory v. Ashcroft*, except such an explicit definition.

But this Court has never required that degree of extreme explicitness, even in the context of State sovereign immunity, where, under the Court's decisions, constitutional concerns

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[14] In fact, the federal petitioners disavow this approach (FCC Br. 15), although in the end their position is difficult to distinguish from what they disavow. See, *e.g.*, FCC Br. 9 ("Section 253(a) cannot be construed to [apply to municipal entities] unless it can be concluded with certainty that Congress so intended.").

and matters of federalism are most directly implicated. See, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring), cited in *Gregory*, 501 U.S. at 467. And the Court has, time after time, rejected the proposition that *Gregory* requires that kind of explicitness. As we have noted, *City of Columbus*, *Mortier*, and *Lawrence County* implicitly reject any such reading of *Gregory*. But beyond that, the Court has explicitly rejected such a reading of *Gregory* in *Salinas v. United States*, *supra*, and in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998); indeed, *Gregory* itself is inconsistent with petitioners' view.

1. *Salinas* is, as the court of appeals noted, a close parallel to this case. In *Salinas* the federal government prosecuted a county official under 18 U.S.C. 666, a bribery statute that applies to agents of local governments that receive federal funds. The statute makes it a crime to accept a bribe "in connection with any business, transaction, or series of transactions of such * * * government" (18 U.S.C. 666(a)(1)(B)). The question was whether the statute reached bribes that did not affect federal funds.

The Court, emphasizing Congress's use of the word "any" in Section 666(a)(1)(B), held that "the prohibition is not confined to a business or transaction which affects federal funds." 522 U.S. at 57. Petitioners in this case assert that Section 253(a) could have specifically said that "any entity" includes municipalities and municipally-owned utilities. But the same could have been said in *Salinas*. Section 666(a)(1)(B) could have said, explicitly, that the prohibition extends to any transaction "whether or not it affects federal funds." The Court flatly rejected the demand for that kind of explicitness in *Salinas*. Petitioners' analogous demand should be rejected here.

Petitioners try to distinguish *Salinas* in two ways. First, they assert, the Court in *Salinas* looked at more than the text

of the statute; it considered the background and apparent purposes of the statute as well. See Nixon Br. 31-32; FCC Br. 21-22; SW Bell Br. 26-27. But what the Court said in *Salinas* was: "The *text* of § 666(a)(1)(B) is unambiguous on the point under consideration here" (522 U.S. at 60; emphasis added). Accordingly, the Court said, *Gregory* "does not warrant a departure from the statute's terms." *Ibid.* In any event, as we explained, more than the text of Section 253(a) supports the conclusion that "any entity" includes municipal entities: other statutory provisions, the legislative history, and the findings of the FCC all reinforce that conclusion.

Second, petitioners assert that the statute at issue in *Salinas* posed less of a threat to the State's sovereign interests than does Section 253(a). See SW Bell Br. 27; FCC Br. 22; Nixon Br. 31. Again, this Court did not view *Salinas* that way. The reason the Court gave for declining to apply the *Gregory* presumption was that the statute was unambiguous. The *Salinas* Court never distinguished *Gregory* on the ground that State interests were implicated to a lesser degree in *Salinas*. Nor were they: in *United States v. Bass*, 404 U.S. 336, 349 (1971), the Court held that "a significant change in the sensitive relation between federal and state criminal jurisdiction" would warrant the application of a plain statement approach.

2. *Yeskey* makes it even clearer, if that is possible, that petitioners are wrong to suggest that Section 253(a) cannot be interpreted to reach municipalities unless Congress mentions them explicitly. The question in *Yeskey* was whether Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, covers state prison inmates. The ADA prohibited discrimination by any "public entity" and defined "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12132; 12131(1)(B).

The question in *Yeskey* was whether prisons fell within the definition of "public entity." The Court assumed that the *Gregory* "plain-statement rule" applied to this question, because "control over the management of state prisons, like establishing the qualifications of state officials, is a traditional and essential state function" (524 U.S. at 209). "'It is difficult to imagine an activity in which a State has a stronger interest.'" *Ibid.*, quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973).

Having made this assumption, the Court in *Yeskey* unanimously held that the *Gregory* rule "is amply met" because "the statute's language unmistakably includes State prisons and prisoners within its coverage." 524 U.S. at 209. That is, even though the definition of "public entity" in the ADA did not specifically refer to prisons, *Gregory* was satisfied because prisons are within the ordinary meaning of the terms used in the statutory definition. 524 U.S. at 210.

The federal petitioners' effort to distinguish *Yeskey* is manifestly unsuccessful. According to the federal petitioners, "the terms of the ADA made clear that the statute was specifically intended to govern state governments in their relations to private parties" (FCC Br. 20), whereas "Section 253(a) does not provide any indication that Congress specifically considered and intended to authorize any special intrusion on state sovereignty" (FCC Br. 21). But Section 253(a) certainly did "ma[k]e clear that the statute was specifically intended to govern state governments" insofar as entry into telecommunications markets was concerned. And, by the same token, the ADA did not show that Congress "specifically considered and intended to authorize any * * * intrusion on" the State role in managing prisons. Petitioners' claim simply cannot survive *Yeskey*.

3. In fact, as *Yeskey* explained (see 524 U.S. at 209), *Gregory* itself decisively refutes petitioners' position. The Court held in *Gregory* that the Age Discrimination in

Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, did not preempt a State constitutional provision that specified a mandatory retirement age for state judges. As the Court said in *Yeskey*:

> [I]n *Gregory* * * * although the ADEA plainly covered state employees, it contained an exception for "appointee[s] on the policymaking level" which made it impossible for us to "conclude that the statute plainly cover[ed] appointed state judges." Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.

524 U.S. at 209 (citation and internal quotation marks omitted; emphasis in original).

In other words, in *Gregory*, the Court had no difficulty in considering judges to be "state employees"—even though, as a matter of ordinary usage, that is, if anything, more questionable than describing municipalities and municipal utilities as "entities." *Gregory* applied its presumption not to the relatively clear term "employees" but to the plainly ambiguous phrase "appointees on the policymaking level." Nothing in Section 253(a) is remotely as ambiguous as that phrase.

This case is like *Yeskey* and not like *Gregory*; indeed it follows *a fortiori* from *Yeskey*. It is implausible to suppose that the incursion on State sovereignty in this case approaches that involved in *Yeskey*; one could hardly say about State regulation of municipal entry into telecommunications markets that "'[i]t is difficult to imagine an activity in which a State has a stronger interest.'" *Yeskey*, 524 U.S. at 209, quoting *Preiser*, 411 U.S. at 491. Section 253(a), like the ADA in *Yeskey*, contains an unambiguous phrase—"any entity"—that, given its ordinary meaning, includes municipalities and municipal utilities. Like *Yeskey*, and unlike *Gregory*, Section 253(a) is "*without* any exception" (*Yeskey*, 524 U.S. at 209; emphasis in original). It is true that there is no explicit

mention of municipalities in Section 253(a) itself—but there was no explicit mention of prisons in *Yeskey*. And unlike in *Yeskey*—where the Court made no mention of the structure of the statute or the legislative history—there is abundant evidence in the structure of the Telecommunications Act and the legislative history that Congress intended Section 253(a) to extend to municipalities and municipally-owned utilities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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